



STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION
DIVISION OF WATER POLLUTION CONTROL
401 Church Street
L&C Annex 6th Floor
Nashville, TN 37243-1534

February 19, 2008

Mr. Jeff Israel, Esq. – Registered Agent
Home Depot U.S.A., Inc.
2455 Paces Ferry Road
Building C, 20th Floor
Atlanta, Georgia 30339

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
RECEIPT #7006 0810 0000 1061 7191

Subject: DIRECTOR'S ORDER NO. WPC08-0013
THE HOME DEPOT STORE
BRADLEY COUNTY, TENNESSEE

Dear Mr. Israel:

Enclosed is a Director's Order and Assessment of Civil Penalty issued by Paul E. Davis, Director of the Division of Water Pollution Control, under the delegation of Commissioner James H. Fyke. Read the Order carefully and pay special attention to the NOTICE OF RIGHTS section.

Corporations, limited partnerships, limited liability companies, and other artificial entities created by law must be represented in any legal proceeding resulting from an appeal of this Order and Assessment by an attorney licensed to practice law in the State of Tennessee. Non-attorneys may participate in any such proceedings to the extent allowed by law.

If you or your attorney has questions concerning this correspondence, contact Mark Jordan at (615) 532-0675.

Sincerely,

Patrick N. Parker, Manager
Enforcement and Compliance Section

PNP:MAJ

cc: DWPC – EFO-Chattanooga
DWPC – Compliance File
NRS
OGC

IN THE MATTER OF:)	
)	
HOME DEPOT USA, INC.)	
)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
RESPONDENT)	CASE NUMBER WPC08-0013
)	

NOW COMES Paul E. Davis, director of the Tennessee Division of Water Pollution Control, and states:

I.

II.

1

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act (the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and the commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the “Rule”). Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

IV.

The Respondent is a “person” as defined by T.C.A. § 69-3-103(20) and as herein described, has violated the Act.

V.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (hereinafter the “ARAP”) that is not governed by a general permit or a § 401 Water Quality

Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

VI.

The unnamed tributaries to South Mouse Creek, a wetland adjacent to the unnamed tributaries to South Mouse Creek, and South Mouse Creek, described herein, are “waters of the state” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife.

FACTS

VII.

On February 17, 2003, an application for an Individual ARAP was submitted on behalf of the Respondent by Register and Associates, Inc. The application requested written authorization for the following activities at the site:

- Relocation of 848 linear feet of an unnamed tributary to South Mouse Creek identified as Waterway #2 and associated Springs #1 and #2 to provide flow into relocated Waterway #2.
- Relocation of 364 linear feet of an unnamed tributary to South Mouse Creek identified as Waterway #3.
- Fill of 0.37 acres of jurisdictional wetland.

VIII.

On June 19, 2003, Individual ARAP NRS03.048 (hereinafter “the permit”) was issued for the proposed activities. The permit required on-site compensatory mitigation including enhancement of 3.9 acres of wetland, restoration of 1.5 acres of existing wetlands in South Mouse Creek floodplain, and restoration of 1,230 linear feet of the west bank of South Mouse Creek.

IX.

On January 25, 2006, division personnel conducted a site inspection to determine the status of the stream and wetland compensatory mitigation activities authorized by the permit. Division personnel noted the following conditions:

- The vegetative plantings associated with relocated Waterway #2 had not been conducted, as required by Condition #13 of the permit.
- The relocation of Waterway #3 was not successful. Division personnel noted that wetlands had formed in the relocation area and that relocation of Waterway #3 was no longer feasible in this area, resulting in the loss of 364 linear feet of stream.
- The redirection of flow from Spring #1 into relocated Waterway #2 required by Condition #15 of the permit was not successful.
- An unauthorized rock check dam had been constructed at a culvert in the upper section of the stream.

X.

On January 31, 2006, the division issued correspondence to the Respondent summarizing the findings of the January 25, 2006, site inspection. The Respondent was instructed to complete the plantings along Waterway #2 as required by Condition #13, and submit a plan to correct the failed flow redirection of Spring #1 or enhance the existing conveyance containing the spring flow and remove the rock check dam. Additionally, the Respondent was instructed to locate mitigation opportunities in the area that would compensate for the loss of 364 linear feet of stream due to the failure to relocate Waterway #3.

XI.

On June 8, 2006, the division issued a Notice of Violation (NOV) to the Respondent for failure to submit the information requested in the January 31, 2006, correspondence. The Respondent was instructed to submit a plan to address the failure to comply with the terms and conditions of the permit, specifically the failure to relocate Waterway #3. Additionally, the Respondent was instructed to submit monitoring reports for the completed stream and wetland mitigation activities. The Respondent was instructed to submit the requested documents within thirty days of receipt of the NOV.

XII.

On July 7, 2006, a meeting to discuss the June 8, 2006, NOV was conducted at the site. During this meeting, a representative of Sunbelt Construction, contracted by Home Depot to perform construction activities, indicated that the relocation of Waterway #3 was complete and acceptable. Division personnel instructed the Respondent to submit a Mitigation Compliance Plan (MCP), detailing proposed actions to be taken to comply with the terms and conditions of the permit.

XIII.

On July 18, 2006, Register and Associates, Inc., submitted a MCP via facsimile to the division on behalf of the Respondent. On July 20, 2006, the division received a hard copy of this plan. The plan proposed that a perforated pipe be installed to convey flow from Spring #1 into relocated Waterway #2. The division subsequently determined that this pipe had been installed prior to submittal of the plan. The plan also contained general details regarding the reshaping of the detention basin to accommodate a channel and flow from Spring #2, a statement that additional plantings were needed and an assertion, without supporting documentation, that the relocation of Waterway #3 had been successful.

XIV.

On August 7, 2006, the division requested, via email, additional information to supplement the proposals in the MCP. Specifically, the division requested additional details regarding the final planting scheme in the on-site detention area and the area in front of the store location, details justifying the assertion that the relocation of Waterway #3 had been successful and final plans for the reshaping of the detention basin to facilitate the construction of a channel through the basin.

XV.

On March 6, 2007, the Respondent submitted the first annual monitoring report (AMR), as required by Conditions #9 and #10 of the permit, for calendar year 2006.

XVI.

On March 26, 2007, the division issued correspondence to Register and Associates, Inc., detailing permit compliance deficiencies noted in the 2006 AMR. Specifically, the division noted that loss of flow was occurring in relocated Waterway #2, vegetation survival rates were not being met and PEM1A wetlands criteria in the mitigation areas were not being met. Additionally, the AMR contained insufficient details to determine the condition of relocated Waterway #3 and to determine the adequacy of the design of the stream channel through the detention basin. Register and Associates, Inc., was instructed to submit photographic documentation of the plantings along South Mouse Creek and photographs of the relocated channel from Mouse Creek Road to the culvert to document the establishment of native vegetation. Register and Associates, Inc., acknowledged receipt of this correspondence, via email, on April 2, 2007.

XVII.

On June 27, 2007, the division issued a NOV to the Respondent for failure to provide the documents requested in March 26, 2007, correspondence. The Respondent was instructed to complete the following activities within the specified deadlines:

- By July 19, 2007, provide a plan prepared by a qualified professional to restore flow to relocated Waterway #2 and satisfy vegetation survival rates.
- By July 27, 2007, provide sufficient information to determine if the PEM1A wetland criteria had been met.
- By July 27, 2007, provide sufficient information to determine the adequacy of construction of the stream channel in the detention basin.

- By July 27, 2007, provide sufficient information to determine the status of relocated Waterway #3.
- By November 30, 2007, complete the restoration activities associated with relocated Waterway #2.

XVIII.

On July 19, 2007, a corporate representative of the Respondent, requested clarification concerning the location of the activities referred to in previous correspondence.

XIX.

On September 21, 2007, the division issued a NOV to the Respondent for failure to respond to the June 27, 2007, NOV and provide the documents requested in March 26, 2007, correspondence. The Respondent was instructed to complete the following activities within the specified deadlines:

- By October 19, 2007, submit a plan to restore flow to relocated Waterway #2 and satisfy the vegetation survival requirements along the relocated waterway.
- By October 19, 2007, provide sufficient information to determine if the PEM1A wetland criteria had been met.
- By October 19, 2007, provide sufficient information to determine the adequacy of the construction of the stream channel in the detention basin.
- By October 19, 2007, provide sufficient information to determine the status of relocated Waterway #3.
- By November 30, 2007, complete the restoration activities associated with relocated Waterway #2.

XX.

To date, the Respondent has not provided information requested in the March 26, 2007 correspondence nor has the respondent responded to NOV's issued on June 27, 2007, and September 21, 2007.

VIOLATIONS

XXI.

By failing to comply with the terms and conditions of NRS03.048, the Respondent has violated T.C.A. § 69-3-114(b), which states in part:

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

ORDER AND ASSESSMENT

XXII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, Paul E. Davis, hereby issue the following Order and Assessment to the Respondent.

1. The Respondent shall, within 30 days of receipt of the Order and Assessment, submit for review and approval, a remediation plan containing the following elements:

- Detailed descriptions of the methods proposed to maintain flow in relocated Waterway #2.

- Detailed descriptions of the methods proposed for the restoration of vegetated areas.
- Detailed descriptions of the methods proposed for the construction of a stream channel through the detention basin for the flow of Spring #1.
- Detailed justification for the assertion that the relocation of Waterway #3 is successful.

This plan should be submitted to the Manager of the Natural Resources Section at 401 Church Street, 7th Floor L&C Annex, Nashville, Tennessee 37243-1534. The Respondent shall correct any deficiencies noted by the NRS and submit the corrected plan within 30 days of notification of any deficiencies.

2. The Respondent shall, within 30 days of receiving written approval from the NRS, initiate the approved actions and submit notification to the NRS at the time the approved actions are initiated.
3. The Respondent shall, within 90 days of notification to the NRS, complete the approved actions and submit notification of the completion of these actions to the NRS.
4. The Respondent shall continue to submit the annual monitoring reports as required by Conditions #9 and #10 of NRS03.048.
5. The Respondent shall pay a CIVIL PENALTY of TWENTY ONE THOUSAND FIVE HUNDRED DOLLARS (\$21,500.00) to the division, hereby ASSESSED to be paid as follows:

- a. The Respondent shall, within 30 days of entry of this Order and Assessment, pay a CIVIL PENALTY in the amount of FIVE THOUSAND FIVE HUNDRED DOLLARS (\$5,500.00).
- b. If the Respondent fails to comply with Part XXII, item 1 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default.
- c. If the Respondent fails to comply with Part XXII, item 2 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default.
- d. If the Respondent fails to comply with Part XXII, item 3 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default.
- e. If the Respondent fails to comply with Part XXII, item 4 above in a timely manner, the Respondent shall pay a CIVIL PENALTY in the amount of FOUR THOUSAND DOLLARS (\$4,000.00), payable within 30 days of default.


The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The director may, for good cause shown, extend the compliance dates contained within this Order and Assessment. In order to be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the division will be in writing.

Should the Respondent fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondent is advised that the foregoing Order and Assessment is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the Order and Assessment will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Issued by the director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this 20th day of February 2008.



Paul E. Davis, P.E.
Director, Division of Water Pollution Control

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109, 115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within thirty (30) days of receiving this Order and Assessment. The petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548".

If the required written petition is not filed within thirty (30) days of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an

agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to the Division of Fiscal Services, Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L & C Annex, 401 Church Street, Nashville, TN 37243. The case number, shown on the first page of this Order and Assessment, should be included on or with the payment. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6th Floor L & C Annex, 401 Church Street, Nashville, TN 37243.